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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER ROBERT
POLLAK,

Defendant and Appellant.

2d Crim. No. B286913
(Super. Ct. No. 1503497)
(Santa Barbara County)

Christopher Robert Pollak appeals from the judgment entered after his conviction by a jury of first degree robbery in an inhabited dwelling. (Pen. Code, §§ 211, 212.5, subd. (a).)¹ The jury found true an allegation that he had personally used a deadly weapon, a metal dinner fork. (§ 12022, subd. (b)(1).) The trial court found true allegations that he had been convicted of a

¹ Unless otherwise stated, all statutory references are to the Penal Code.

prior serious felony within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Appellant was sentenced to prison for 14 years.

Impeachment Contention

The residential robbery occurred immediately after the victim had voluntarily performed oral sex on appellant. Appellant contends that the trial court erroneously excluded evidence that, prior to performing oral sex, the victim did not disclose that he was a carrier of human immunodeficiency virus (HIV). Appellant claims that the failure to disclose showed moral turpitude and was therefore admissible to impeach the victim's credibility. Appellant asserts, "[The victim] was duty bound to share his HIV status with [appellant] prior to performing oral sex on him." "By prohibiting defense counsel from impeaching [the victim's] credibility through evidence of his failure to disclose his HIV status, the court cloaked [the victim] in a 'false aura of veracity.'" We affirm.

Facts

T.R. posted a sexual ad on Craigslist. He wanted to perform oral sex on other men. Appellant answered the ad through an email.

T.R. and appellant met inside T.R.'s apartment. T.R. performed oral sex on appellant. After completion of the sex act, appellant pulled up his pants and grabbed a metal dinner fork on the kitchen counter. He threatened T.R. saying that he would put the fork in his neck. He forced T.R. to give him his cell phone, wallet, keys, computer, and other property. Appellant then "ran out the door" with T.R.'s property.

By way of defense, appellant said he thought that he had sent nude photos of himself to a woman. He went to the victim's house to get him to delete the photos. When the victim tried to put his hands in appellant's pants, appellant's fanny pack came off. The victim took the fanny pack. Appellant took the victim's property to exchange it for his fanny pack and its contents. He denied that the victim orally copulated his penis.

Evidentiary Ruling Precluding HIV Disclosure

Before opening statements, the prosecutor said that he had "disclosed privately to [defense counsel] . . . a medical condition that [T.R.] . . . had at the time that he engaged in oral sex on [appellant]." The prosecutor did not inform the court of the nature of the "medical condition," and requested that evidence of the medical condition be excluded.

Defense counsel protested that T.R.'s failure to disclose is relevant "in determining [his] credibility."

The trial court asked: "[Does] either side think we need a[n] [Evidence Code section] 402 [hearing] to elicit whether or not, one, there was any conversation [between T.R. and appellant about medical conditions], or two, the understanding as to infectiousness or transfer? Are those issues that either side considers relevant?"² Defense counsel replied, "[T]he only

² Evidence Code section 402 provides that, "[w]hen the existence of a preliminary fact is disputed, . . . [¶] [t]he court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury." (*Id.*, subds. (a), (b).) "Evidence Code section 402 provides a procedure for the trial court to determine outside the presence of the jury whether there is sufficient evidence to sustain a finding of a preliminary fact, upon which the admission of other evidence depends." (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1156.)

evidence that is relevant is that he failed to disclose, . . . [which is] a misrepresentation by omission.” The prosecutor argued that T.R. did not have a duty to disclose his medical condition.

The court refused to admit evidence of T.R.’s medical condition. “I don’t think the simple omission [to disclose] based upon the facts that we have before us, which is a representation by counsel, rise[s] to the level that I would allow inquiry. The court noted that there was no evidence as to T.R.’s “state of health” or the “likelihood of transmission” of the medical condition. The court expressed concern that further exploration of these issues would “get[] us down a[n] [Evidence Code section] 352 rabbit hole.”

After a recess, defense counsel asked the trial court to reconsider its ruling. Without disclosing the nature of T.R.’s medical condition, counsel said: “[T]he nondisclosure of that type of information is moral turpitude. . . . That particular medical condition is non-curable and life-threatening, and I think it calls into question [T.R.’s] credibility by nondisclosure. And I’ll submit.” The trial court denied reconsideration and said: “Without more, I think that it would be confusing to the jury . . . [and] have an undue consumption of time.”

The only reference in the record to HIV occurred after appellant’s conviction when the trial court denied a motion for new trial. The court said, “The Court ruling with respect to the H.I.V. evidence pursuant to Evidence Code [section] 352 I’ve reconsidered and believe that that was the appropriate decision given the circumstances, likely confusing to the jury and [necessitating undue] consumption of time.”

Impeachment With Moral Turpitude Conduct

“A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]” (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) Conduct “involve[s] moral turpitude when [it] reveal[s] dishonesty, a “general readiness to do evil,” “bad character” or ‘moral depravity.’ [Citation.] Such [misconduct] involve[s] an act of baseness, vileness, or depravity in the private and social duties which a person owes to others or to society in general, contrary to the accepted and customary rule of right and duty between people. [Citation.]” (*People v. Gabriel* (2012) 206 Cal.App.4th 450, 456.)

Having HIV is not “conduct” within the meaning of the moral turpitude impeachment rule. Assuming arguendo that failure to disclose a HIV condition before sexual relations involves moral turpitude, the trial court’s evidentiary ruling must nevertheless be affirmed. “Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

To establish moral turpitude, the burden was on appellant to produce evidence of the following preliminary fact: T.R. knew he had a medical condition that could be transmitted to appellant by performing oral sex on him. “[P]reliminary fact’ means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.” (Evid. Code, § 400.) “The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds

that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact.” (Evid. Code, § 403, subd. (a)(1).)

Appellant failed to carry his burden of producing evidence sufficient to warrant a jury finding of the requisite preliminary fact. There is no evidence that T.R.’s “medical condition” could be transmitted by performing oral sex on another person. Appellant did not accept the trial court’s offer to conduct an Evidence Code section 402 hearing on this issue. Even if at the time of its evidentiary ruling the court had been informed of T.R.’s HIV status, it could not have assumed that he had put appellant at risk of contracting the disease. As noted by the People in their brief, the CDC (Centers for Disease Control and Prevention) unequivocally states that HIV is not transmitted by saliva.

Because appellant did not show that the excluded evidence was relevant, the trial court did not abuse its discretion. “Only relevant evidence is admissible. (Evid. Code, § 350.)” (*People v. Brady* (2010) 50 Cal.4th 547, 558.) We therefore need not consider whether, if the evidence were relevant, the trial court would have abused its discretion by excluding it pursuant to Evidence Code section 352.

Appellant’s Confrontation Rights Were Not Violated

Appellant argues that the trial court’s evidentiary ruling deprived him of his Sixth Amendment right to confront witnesses against him. Appellant was not so deprived because the evidence excluded was not relevant to T.R.’s credibility. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

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